

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

NEIL JOSEPH COLVIN,

Defendant and Appellant.

A158358

(Marin County
Super. Ct. No. SC208612A)

Neil Joseph Colvin (Colvin) appeals the trial court’s electronics search conditions imposed as terms of his probation. Based on the test articulated in *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), the conditions are invalid. Accordingly, we strike them.¹

FACTUAL AND PROCEDURAL BACKGROUND

In the early hours of April 16, 2019, a Marin County sheriff’s deputy conducted an enforcement stop of a vehicle in San Rafael, California, in response to reports of a suspect attempting to open car doors and rummaging through vehicles. Colvin was the passenger in the stopped car. Inside the vehicle, officers located “a yellow envelope containing a Fastrak device from a

¹ Because the conditions are listed as two separate conditions in the probation report, we refer to them in the plural.

nearby address, numerous sunglasses, gloves, hats, a flashlight, a Garmin GPX, [a] wallet with retail packaging, [a] bag with golf clubs, and a Google Home mini in packaging. Inside a backpack belonging to Colvin, there was heroin, psilocybin mushrooms, drug paraphernalia, and Xanax medication without a valid prescription.”

A number of victims identified Colvin as the person who tried to open their vehicles or rummaged through them. Colvin’s codefendant said she was dating Colvin, and “she was driving Colvin around the neighborhood to steal from vehicles.” A search of Colvin’s backpack “revealed several credit cards, insurance cards, AAA cards, and debit cards in [the] names . . . [of five victims]. . . . There were also three vials containing . . . cocaine, . . . heroin, [and] suspected LSD.” A probation search of the codefendant’s residence uncovered additional stolen property.

Like the codefendant, Colvin was on probation at the time of his arrest. Colvin initially denied any wrongdoing. Later, during his probation interview, Colvin stated he relapsed on heroin and Xanax, and he stole items from cars to purchase drugs. “He pawned the items[,] mostly sunglasses[,] at the pawn shop for approximately \$20.00 to \$30.00.”

On April 18, 2019, the People filed a 24-count complaint against Colvin and the codefendant. The People charged Colvin with two felonies: conspiracy to commit auto tampering and theft (Pen. Code, §§ 182, subd. (a)(1), 484, subd. (a), Veh. Code, § 10852; count 1),² and buying or receiving stolen property (§ 496, subd. (a); count 2). The People also charged Colvin with one misdemeanor count of buying or receiving stolen property (§ 496, subd. (a); count 3), five counts of misdemeanor prowling (§ 647, subd. (h); counts 5, 7, 9, 11, 12); four counts of misdemeanor tampering with

² Undesignated statutory references are to the Penal Code.

or injuring a vehicle or its contents (Veh. Code, § 10852; counts 6, 8, 10, 13); two counts of misdemeanor possession of a controlled substance (Health & Saf. Code, §§ 11350, subd. (a); 11377, subd. (a); counts 14, 15); and one count of misdemeanor possession of a controlled substance without a prescription (Health & Saf. Code, § 11375, subd. (b)(2); count 16).³

On June 10, 2019, Colvin entered a plea of guilty to counts 2, 5, 13 and 14. He pled guilty to one felony count of buying or receiving stolen property (§ 496, subd. (a); count 2), to misdemeanor prowling (§ 647, subd. (h); count 5), to misdemeanor tampering with or injuring a vehicle or its contents (Veh. Code, § 10852; count 13), and to misdemeanor possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a); count 14). The court dismissed the remaining charges against Colvin.

On July 3, 2019, the trial court suspended imposition of sentence and placed Colvin on three years of probation. The probation report contained electronics search conditions. At the sentencing hearing, Colvin's counsel objected and requested the conditions be stricken because they were "not part of the negotiated disposition, and I do not recall any part of the facts of this case involving Mr. Colvin's cell phone or any text messaging or any [il]licit activity relating to electronic devices."

The probation officer argued the conditions were appropriate to determine whether Colvin was communicating with the codefendant. The People argued that "given the nature of the offense and the identity theft related component, the statements by the defendant that he's stealing things and selling them, that it's reasonable to make sure that probation is allowed

³ Colvin mistakenly claims he was also charged with the offenses in counts 4, 17, 18, and 19. The People mistakenly claim that Colvin was charged with the offenses in counts 4, 17, 18, 19, 20, 21, and 22. Those charges were against Colvin's codefendant.

to search his phone and electronics and confirm that he is not engaging in that type of behavior.”

The court imposed the electronics search conditions finding they were “necessary for probation’s ability to monitor and enforce the terms of the probation. Those may also be part of the Adult Drug Court contract anyway, I don’t recall, but I think there is a basis for those conditions in this case.”

The court required Colvin to permit “the search of all electronic devices, including cell phones and computers over which you have access or control for electronic communication at any time of the day or night by any law enforcement officer, probation officer or mandatory supervision officer, with or without a warrant, probable cause or reasonable suspicion.” The court continued: “You are also to provide access and/or passwords to any electronic devices, computers, cell phones, accounts and applications to any law enforcement officer, probation officer or mandatory supervision officer, and you waive the specific consent and warrant requirements in Penal Code Section 1546 and 1546.1”⁴ Colvin appeals.

DISCUSSION

On appeal, Colvin argues the electronics search conditions are invalid under *Lent, supra*, 15 Cal.3d at p. 486. We agree.

⁴ With minor exceptions, the court’s statement matches the text of the electronics search conditions in the probation report. However, the minutes of the hearing include a different condition, providing “Defendant shall submit to search and seizure of all call logs, text and voicemail messages, photographs, emails, and social media account contents contained on any device or internet connected storage owned, operated, or controlled by him/her, including cell phones, computers, gaming consoles, mobile devices, and mobile or electronic storage devices. Defendant shall also disclose and provide any security information required to gain access to any of the aforementioned devices or social media accounts. . . .” The People appear to claim the court imposed this condition. Not so. Instead, the trial court imposed the conditions as stated in the probation report.

I. *The Lent Test*

A sentencing court has broad discretion to fashion appropriate conditions of probation that facilitate rehabilitation and foster public safety. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) We review the conditions imposed for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) A condition of probation is invalid if it “ “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.” ’ ” (*In re Ricardo P.* (2019) 7 Cal.5th 1113, 1118 (*Ricardo P.*), quoting *Lent, supra*, 15 Cal.3d at p. 486.) “The *Lent* test ‘is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term.’ ” (*Ricardo P.*, at p. 1118.)

II. *The Electronics Search Conditions Are Invalid*

Colvin argues the electronics search conditions are invalid because they satisfy the three prongs of the *Lent* test. We consider each requirement.

A. *Colvin Satisfies the First Prong of the Lent Test*

Colvin argues the probation conditions have no relationship to his convictions. The People respond that the conditions were “related to appellant’s underlying offenses because he had been charged with theft and convicted of receiving stolen electronic devices, including two laptop computers, a GPS device, and a Google Home Mini.”

We are not persuaded by the People’s response. Colvin was not charged with or convicted of receiving two stolen laptop computers. This claim is based on a victim’s statement in the probation report, who stated that while visiting San Francisco in May 2018—almost a year before the conduct giving rise to the charges against Colvin and the codefendant—various items including two laptop computers and a Costco Visa card were stolen. During

their search of the codefendant's residence, police located the Costco Visa card, but not the laptop computers. The complaint does not identify this victim, and neither Colvin nor his codefendant were charged with stealing items from a car in San Francisco in May 2018.

Police found a GPS device and a Google Home Mini when they searched the codefendant's car, but these items are not mentioned in the complaint, and there is nothing to indicate that any of the charges against Colvin were based on the recovery of these items. In addition, "there is no indication that any electronic device was involved in the commission of" Colvin's crimes. (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1119.) Accordingly, Colvin satisfies the first *Lent* requirement.

B. *Colvin Satisfies the Second Prong of the Lent Test*

Colvin argues the electronics search conditions relate to conduct that is not criminal. (*Lent*, *supra*, 15 Cal.3d at p. 486.) The People do not argue otherwise. Therefore, the second *Lent* requirement is met. (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1119.)

C. *Colvin Satisfies the Third Prong of the Lent Test*

Colvin argues the electronics search conditions are not " 'reasonably related to future criminality.' " (*Lent*, *supra*, 15 Cal.3d at p. 486.) We agree.

To show a condition of probation is reasonably related to future criminality, there must be "an actual connection," not just an abstract or hypothetical one, between the condition and the probationer's criminal conduct or personal history, and the condition's infringement on the probationer's liberty must not be " 'substantially disproportionate to the ends of reformation and rehabilitation.' " (*In re Alonzo M.* (2019) 40 Cal.App.5th 156, 166, quoting *Ricardo P.*, *supra*, 7 Cal.5th at pp. 1120–1121, 1126.)

The People claim Colvin’s electronics search conditions are “proportional and reasonably related to preventing . . . future criminality” because they will “assist his probation officer in ensuring that he does not, once again, steal, buy, or receive, stolen electronic devices, [and] will assist his probation officer in monitoring his compliance with other court orders, including that he not communicate with his codefendant girlfriend . . . or otherwise conspire to commit additional thefts.”

But Colvin’s probation conditions do not bar him from communicating with the codefendant. At Colvin’s arraignment on April 19, 2019, the court released Colvin on his own recognizance (O.R.), subject to various conditions, including that he not communicate with the codefendant. The People fail to explain how or why this O.R. release condition has any relevance when considering the validity of the electronics search conditions imposed as terms of Colvin’s probation.

The People argue the electronics search conditions will assist Colvin’s probation officer in monitoring his behavior and will enable the probation officer “to examine his devices to ensure they are not stolen.” This justification establishes no more than “an abstract or hypothetical relationship between the probation condition and preventing future criminality.” (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1121.)

The challenged probation conditions require Colvin to provide access to all electronic devices, including “computers, cell phones, accounts and applications.” The People concede they authorize the probation officer to conduct “unlimited searches.” We conclude the burden these conditions impose on Colvin’s privacy is “substantially disproportionate to the countervailing interests of furthering his rehabilitation and protecting

society.” (*Ricardo P.*, *supra*, 7 Cal. 5th at p. 1119.) Therefore, Colvin satisfies the third prong of the *Lent* test.

D. *The Record Does Not Support a Remand*

Relying on *In re Sheena K.* (2007) 40 Cal.4th 875, and *People v. Appleton* (2016) 245 Cal.App.4th 717, the People argue that if the electronics search conditions are overbroad, “this matter should be remanded to the trial court for modification.” These cases are inapposite because Colvin does not argue the conditions are unconstitutionally overbroad. Instead, Colvin argues they are invalid under the *Lent* test.

In seeking a remand, the People cite *In re Alonzo M.*, *supra*, 40 Cal.App.5th at page 166, in which the Court of Appeal found an electronics search condition was permissible under the third prong of the *Lent* test. Nevertheless, the Court of Appeal remanded the matter to the trial court to determine whether a narrower search condition was appropriate because the minor’s “successful rehabilitation depends on avoiding negative social influences,” and another probation condition required him “to stay away from his coresponsibles.” (*In re Alonzo M.*, at p. 166.)

But here, Colvin’s other probation conditions do not require him to stay away from the codefendant. The record before us does not support the People’s assumption that a narrower electronics search condition would be permissible under the third prong of the *Lent* test. Accordingly, we strike Colvin’s electronics search conditions, and we do not remand for further proceedings.

DISPOSITION

We strike the electronics search conditions from Colvin’s terms and conditions of probation. Because the court’s minutes include a different

electronics search condition, we clarify that we strike two conditions as stated on page 11 of the probation report. We strike the condition providing “Defendant shall submit to search of all electronic devices, including cell phones and computers at any time of the day or night by any law enforcement officer, probation officer or mandatory supervision officer, with or without a warrant, probable cause or reasonable suspicion over which the defendant has control over or access to for electronic communication. Defendant must provide access/passwords to any electronic devices, computers, cell phones, accounts and applications to any law enforcement officer, probation officer or mandatory supervision officer.” We also strike the condition providing “Defendant waives the specific consent and warrant requirements set forth in [Penal Code sections] 1546 and 1546.1.” In all other respects, we affirm.

Jones, P. J.

WE CONCUR:

Simons, J.

Burns, J.

A158358